SABAH GAS INDUSTRIES SDN. BHD.

v.

TRANS SAMUDERA LINES (S) SDN. BHD.

HIGH COURT, KOTA KINABALU
DATO' SYED AHMAD IDID J.
[CIVIL SUIT NO. K. 129 OF 1992]
19 FEBRUARY 1993

INJUNCTION: Setting aside - Material non disclosure - Allegation of misrepresentation - Totally a different story.

PRACTICE AND PROCEDURE: Foreign jurisdiction clause - When Malaysian Courts can intervene - Application of proper law - Matter of presumption or intention of parties.

The plaintiffs entered into a Contract of Affreightment (COA) for the lifting of their iron ore from Brazil and Norway. The plaintiffs chartered the defendants' vessels for the same. The plaintiffs claim that the COA is void for uncertainty and fraught with misrepresentation and illegality. The COA states that the charter party shall be governed by English Law and disputes shall be referred to arbitration in London.

The plaintiffs provided the defendants with the first cargo but not the second and third cargo. The defendants gave notice to commence arbitration however the plaintiff did not respond. Arbitration was commenced in London and the arbitrator was to hand out the award when the plaintiff applied for injunction (*ex parte*) restraining the defendant from further participating in the arbitration proceedings and that the Regional Centre for Arbitration (UN), Kuala Lumpur be the most convenient forum in the circumstances.

Held:

[1] The Malaysian Court can intervene but will do so and assume jurisdiction only in rare cases. Such power will be resorted to with great care and on ample evidence produced that the action abroad is really vexatious and useless. The burden is on the party seeking the Court's intervention to prove by evidence that the facts and circumstances are so exceptional and in breach of the foreign arbitration/jurisdiction clause.

[2] Where a party makes *ex parte* application for an injunction, that party must make full and frank disclosure of all material facts. There was no real attempt to reveal the relevant provisions of the Arbitration clause. There was a reference to the appointment of the Arbitrator but not full disclosure of the communication between the plaintiffs, the defendants and the Arbitrator in relation to that appointment. When one looks at the telexes and the communications these tell a very different story, a story of default by the plaintiffs in not nominating liftings by the due dates, of attempts to exercise option to cancel the charter party because the period of laycans had expired, of a request to refrain from arbitration, of an attempt to make the defendant perform the carriage at reduced rates; but when tis was refused, the allegations of misrepresentation, illegality were then quickly put up.

[3] Whether the proper law applicable is the *lex contractus* or *lex solutions* is a matter of presumption and where the parties have expressed themselves (as here) the intention so expressed overrides presumption. As a principle of law and practice a Court will not enforce a contract which is illegal by its own *lex fori* but on the evidence no illegality has been proven.

[Injunction and writ set aside].

Cases referred to:

Globus Shipping & Trading Co. (Pte.) Ltd. v. Taiping Textiles Bhd. [1976] 2 MLJ 154 ***(cit)***

The Eleftheria [1969] 2 All ER 641 ***(foll)***

San Kong Letrik Sdn. Bhd. v. Lembaga Letrik Negara Tanah Melayu & Anor. [1992] 1 CLJ 190 ***(cit)***

Malaysian Government Officers' Co-operative Housing Society Ltd. v. United Asia Investment Ltd. & Ors. [1972] 1 MLJ 113 ***(cit)***

Lai Siew Wah Sdn. Bhd. v. Ng Chin [1988] 1 CLJ 603 / [1988] 1 MLJ 393 ***(foll)***

Ashville - Investments v. Elme Contractors [1987] 37 BLR 55 CA ***(foll)***

Cohen v. Rothfield 1 KB [1919] 410 ***(cit)***

Bristol Corpn. v. John Aird & Co. [1913] AC 241 ***(cit)***

Azimullah v. Master of the S.S. Haldor & 2 Ors. [1965] 1 MLJ 248 ***(cit)***

Amerco Timbers Pte. Ltd. v. Chatsworth Timber Corpn. Pte. Ltd. [1977] 2 MLJ 181 ***(cit)***

Grace Shipping Inc. & Anor. v. C.F. Sharp & Co. (Malaya) Pte. Ltd. [1987] 1 MLJ 257 ***(cit)***

Cocoa Processors Sdn. Bhd. v. UMBC Bhd. & Ors. [1989] 1 CLJ 183 / [1988] 3 MLJ 491 ***(cit)***

The Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. & Ors. [1992] 2 Lloyds Rep. 7 ***(foll)***

Dimskal Shipping Co. S.A. v. International Transport Workers Federation [1992] 1 Lloyds Rep. 115 / [1991] 3 WLR 875 ***(cit)***
Doleman & Sons v. Ossett Corpn. [1912] 3 KB 257 ***(cit)***
Sungei Bulan [1983] 2 MLJ 377 ***(cit)***
Helbert Wagg Co. In Re, [1956] 2 WLR 183, 191 / [1956] 1 All ER 129, 136 ***(foll)***

Legislation referred to:
Arbitration Act 1952, s. 25(2)
Contracts Act 1950, s. 24
Exchange Control Act 1953 (Act 17) ss. 8, 9 & 36
Rules of the High Court 1980, O. 45 r. 7(2)
Arbitration Act 1950, s. 7(b) (UK)

Other sources referred to:
Arbitration Law by Lloyd's, Chapter 6, p. 6-2
Halsbury's Laws, Vol. 2, 4th Edn., p. 289
Maclachlan on **Merchant Shipping**
Mustill and Boyd in the **"Law and Practice of Commercial Arbitration in England",** 2nd Edn., pp. 135 and 502
Pollock & Mulla on **Indian Contract and Specific Relief Acts,** 10th Edn., p. 11
Pre-Emptive Remedies, Goldrein & Wikinson, 2nd Edn., (1991)
Sweet & Maxwell's **Commercial Litigation**

For the plaintiffs - Alex Decena; M/s. Jayasuriya Kah & Co.
For the defendants - Clement A. Skinner; M/s. Skinner Lind Robertson Willie Wong & Chin

JUDGMENT

Syed Ahmad Idid J:
The plaintiffs, through their *ex parte* summons-in-chambers of 17 July 1992, applied for an order that the defendants be restrained from further participating in the arbitration proceedings then being conducted in London and a further order that the "*forum conveniens* most suitable in the circumstances of this case be the Regional Centre for Arbitration (UN), Kuala Lumpur". Plaintiffs also asked that "the Court do appoint the said centre or another body acceptable to the Court to be the Nominating Body for an Arbitration." Additionally, the plaintiffs also sought for an order that the proceedings in progress at that time was "illegal, unlawful, null and void, alternatively that in the event the same is held to be validly in progress, the same be stayed pending the full and final disposal of this action."

Mr. Alexander Decena put forth the submission for the plaintiffs at the *ex parte* hearing in chambers and obtained an order on 28 July 1992 that the arbitration proceedings conducted by Graham Clark (of an address in London) be stayed until further order.

The plaintiffs' claims were for a declaration that the Charter Party or Contract of Affreightment (COA) has been rescinded and deemed determined in law, alternatively void for uncertainty; and for the other orders which I have set out at the introduction above and for costs. A contract of affreightment (COA) is one for the carriage of goods in a ship. In practice these contracts are usually expressed in writing and most frequently in one or other of two types of documents called respectively a charter party and a bill of lading. See **Halsbury's Laws**. See Maclachlan on **Merchant Shipping.**

The defendants on 5 November 1992 filed separate summons-in-chambers, the first (a) to set aside the injunction and the second (b) to set aside the writ of summons on the following grounds:

(i) The plaintiffs and the defendants having incorporated the terms and conditions as in Attachments 'A' and 'B', agreed to refer To Arbitration In London According to English Law the matters in respect of which this action is brought.
(ii) The plaintiffs' claim therefore does not give rise to a cause of action to be adjudicated by the Malaysian Court or by the Regional Centre for Arbitration (UN) Kuala Lumpur; and that
(iii) The plaintiffs' claim is *res judicata.*

As the facts unfold themselves, we see that the Iraq-Kuwait war did have some impact on the COA which both parties had signed on 21 September 1990. The Iraqi invasion of Kuwait took place on 2 August 1990 and the problems abated on 2 March 1991. See defendants' Exhibits HAR-1A with additional clauses 25 to 36 at HAR-1B, and additional clauses 44 to 62 at HAR-1C. These correspond to those submitted by the plaintiffs as Exhibits OCW-7, OCW-5, OCW-6, OCW-3 and OCW-4. By the *Addendum*, it was agreed that other terms will also apply, that is, Attachment 'B' (or OCW-5/HAR-1B) also known as Iron Ore Charter Party Vale do Rio Doce terms 1967 with additional clauses 44 to 62 where charterer declare load port Narvich, Norway, or Attachment 'A' (or OCW-3/HAR-1C if charterer declare load port Tubarao, Brazil). This is a copyright, published by the Baltic & International Maritime Conference (BIMCO),

Copenhagen code-name "OREVOY" with additional clauses 25 to 36. I am unable to accept any contention that these do not form part of the agreements taking into consideration the very nature of the transactions. Maritime practices accept such additions. This is on account of the way ships are chartered, loaded and run. I cannot see how plaintiffs' submission that the contract is void for uncertainty can be acceptable

The plaintiffs, being a company that produce Hot Briguette Iron (HBI) Methanol and Electricity, obtain raw material in the form of iron ore from various sources around the world. They do not own their own fleet of ships. They go to the open market to charter vessels for the carriage and transportation of iron ore. Accordingly they entered into a Contract of Affreightment (COA) for the lifting of their iron ore from Brazil and Norway This, Mr. Alex Decena submits, was "Allegedly" done by the plaintiffs. The defendants, on the other hand, claim that two other shipments are outstanding under the COA. Plaintiffs then deny this and allege that the COA (which they signed in 1990) is (in 1992) void for uncertainty and fraught with misrepresentation and illegality. I do not propose to go into the reasons which Mr. Decena puts forth. The very arguments cannot stand when faced with the facts and the law.

It will be useful to describe a little regarding the additional clauses. Attachment 'A' at its Part 1 within Box 31, under column "Law and Arbitration", is inserted "London". This was TYPED in. Part II as Clause 23.1 (at HAR-1B) states that it is agreed that "**THIS CHARTERPARTY SHALL BE GOVERNED BY ENGLISH LAW ... AND DISPUTES... SHALL BE REFERRED TO ARBITRATION IN LONDON.**" This was deliberately selected over 23.2 which provided for Arbitration in New York. Accordingly 23.2 was deleted. Such agreement shows that Arbitration in London according to English Law was preferred.

Further provisions of the Charterparty include:

Clause 41:

> This contract shall be governed by English Law.

Clause 42:

> Any disputes arising under this Contract shall be settled by Arbitration in London in accordance with the Arbitration Law and procedure prevailing there.

In both these clauses the words "English" and "London" had been inserted respectively in type, thereby showing that Arbitration in London according to English Law had been the subject of agreement.

Clause 58:

> Penalty for non performance is proven damages but not exceeding amount of freight.

Finding:

The plaintiffs provided the defendants with the first Cargo (albeit later than the stipulated period) in February 1992, but not the second and third Cargo.

On or about 21 April 1992 the defendants, through their solicitors, gave notice of commencement of arbitration and proposed three names as arbitrators.

The plaintiffs did not respond to the defendants' requests and did not concur nor name any arbitrator. The defendants on 18 May 1992 appointed Mr. Graham Clark in London as their own arbitrator and gave notice of this to the plaintiffs on the next day. See s. 7(b) of the English Arbitration Act 1950.

On 22 May 1992 the plaintiffs refused to submit to arbitration in London. Instead they claimed that the dispute should be decided in Malaysia. What the plaintiffs in the instant case should have done but did not do was to have challenged the arbitrator's jurisdiction in which case it may have been necessary to adjourn to provide an opportunity for application to the High Court (in London) under s. 2 of the English 1979 Act.

On 8 July 1992 the defendants requested the Arbitrator to make an award whereupon the Arbitrator informed the plaintiffs that he was making an order in "peremptory" form that the plaintiffs deliver a reply to the defendants' points of claim by 17 July 1992 failing which he would proceed to an award.

On 17 July 1992 the plaintiffs through their solicitors informed the Arbitrator that papers had been filed in the High Court at Kota Kinabalu to stay the arbitration proceedings.

Three days later, the Arbitrator informed the plaintiffs that he would grant a further extension to 28 July 1992 to submit a reply failing which he would hand down his award.

On 28 July 1992 the plaintiffs obtained an *ex parte* order staying the arbitration proceedings and informed the arbitrator and defendants' solicitors of this by facsimile. To fully appreciate the situation, it is necessary to refer to the order in full.

On 6 August 1992 the arbitrator handed down his final award.

On 10 August 1992 a copy of the order of 28 July 1992 granting the stay of arbitration proceedings was served on the defendants' solicitors in Hong Kong.

Mr. C. Skinner, who challenges the jurisdiction of the Malaysian Court to hear this action on the ground that there is an arbitration/foreign tribunal clause in the COA, nevertheless accepts that the Court in Malaysia (the High Court in Borneo) "has a residual discretion whether or not to assume jurisdiction". In answer to that the plaintiffs argue that "if the point in dispute is whether the contract containing the (arbitration) clause was ever entered into at all, or was void *ab initio,* illegal or obtained (for example), by fraud, duress or undue influence, the clause does not apply..." **Halsbury's** Vol. 2, 4th Edn., at p. 289. Secondly, plaintiffs claim that as both parties are Malaysians, and that the contract was executed in Malaysia, they cannot avoid the application of Malaysian Law or the jurisdiction of Malaysian Courts even though **THE CONTRACT PROVIDES FOR ENGLISH LAW AND ARBITRATION IN LONDON** (emphasis to distinguish what is in reality and what is now claimed after both had signed the contract). The plaintiffs cite Pollock & Mulla on **Indian Contract and Specific Relief Acts** with commentary critical and explanatory, 10th Edn., at p. 11:

> ...an Indian citizen making a contract whilst in India would not be able and cannot be permitted to avoid the applicability of the Indian Law to the contract made in India or to be performed in part or whole in India.

Further on in the same page the authors write:

> ...If a contract made between a party in India and a party in Italy and the contract is illegal under the law of India, the arbitration agreement and the entire proceedings following thereon are illegal and the award would be tainted with the same infirmity...

In a landmark case in Malaysia, the Federal Court in *Globus Shipping & Trading Co. (Pte) Ltd. v. Taiping Textiles Bhd.* [1976] 2 MLJ 154 decided that even though parties had decided to refer disputes to a foreign Court, the Malaysian Court, where the cause of action in relation to the contract arises and is properly within its jurisdiction, has a discretion whether or not to adjudicate. On p. 155 the Court adopted the decision of Brandon J in *The Eleftheria* [1969] 2 All ER 641 in how this discretion should be exercised:

(a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and Foreign courts.
(b) Whether the law of the Foreign Court applies and, if so, whether it differs from English (or Malaysian as in our case) law in any material respects.
(c) With what country either party is connected, and how closely.
(d) Whether the defendants genuinely desire trial in the foreign country, or as only seeking procedural advantages.
(e) Whether the plaintiffs would be prejudiced by having to sue in the Foreign Court because they would:
  (i) be deprived of security for their claim;
  (ii) be unable to enforce any judgment obtained;
  (iii) be faced with a time-bar not applicable in England (or Malaysia as in our case); or
  (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

On the facts as found in our case, the answer to (a) above can only mean that the defendants have the choice as the plaintiffs did not honour their part of the bargain. The observations as to the other areas are that, in respect of (b) the law is similar; (c) with Malaysia but London too is closely connected in that if there had been any failure by the defendants to convey the goods from Brazil or Norway, the parties could easily arbitrate in London, calling witnesses from either country to attend and to attest; (d) the plaintiffs appear to seek a way out and not honour their agreement; and (e) there is no proof thus far of any prejudice and plaintiffs have not advanced any *iota* of testimony in support.

The plaintiffs signed the Contracts on 21 September 1990. It is sad to observe that only

now they allege illegality and misrepresentation by the defendants

(i) in that ss. 8, 9 and 36 of the Exchange Control Act 1953 (Act 17) prohibit such a transaction;
(ii) that by s. 24 of the Contracts Act 1950, the Contract is unlawful and void.

The arguments that the defendants are not "deponent owners" is not valid as plaintiffs seem to be at odds with what exists in practice. Plaintiffs only wrote to defendants on 22 May 1992 after plaintiffs failed to comply with their terms in the contract. The claim that the shipment was covered by M.V. Carbonesti and not M.V. Locust or the M.V. Orinoco is not fatal as the Contract clearly spells out "or Substitute". While s. 25(2) of the Arbitration Act 1952 gives the Court the power to grant relief when the dispute involves fraud, here there is no evidence of fraud. cf: *San Kong Letrik Sdn. Bhd. v. Lembaga Letrik Negara Tanah Melayu & Anor.* [1992] 1 CLJ 190. Compare what is stated in Mustill and Boyd in the "**Law and Practice of Commercial Arbitration in England**", 2nd Edn. (pp. 135 and 502) and *Malaysian Government Officers' Co-operative Housing Society Ltd. v. United Asia Investment Ltd. & Ors.* [1972] 1 MLJ 113. In accordance with the Supreme Court's ruling in *Lai Siew Wah Sdn. Bhd. v. Ng Chin* [1988] 1 MLJ 393, I am unable to find fraud against the defendants on the evidence adduced by the plaintiffs. Even if there was dispute based upon alleged mistake at the time the contract was entered into or where there was an allegation of misrepresentation or negligent mis-statement, these are within the scope of the arbitration. *Ashville - Investments v. Elme Contractors* [1987] 37 BLR 55 CA.

I am of the opinion that the Malaysian Court can intervene but will do so and assume jurisdiction only in rare cases. Such power will be resorted to with great care and on ample evidence produced that the action abroad is really vexatious and useless. [See *Cohen v. Rothfield* 1 KB [1919] 410]. [See *Bristol Corpn. v. John Aird & Co.* [1913] AC 241 per Lord Multon at p. 256 and 257]. The burden is on the party seeking the Court's intervention to prove by evidence that the facts and circumstances are so exceptional and in breach of the foreign arbitration/jurisdiction clause. [See *The Vishva Apurva, supra*]. [See *Azimullah v. Master of The S.S. Haldor & 2 Ors.* [1965] 1 MLJ 248]. [See *Amerco Timbers Pte Ltd. v. Chatswarth Timber Corpn. Pte Ltd.* [1977] 2 MLJ 181].

By the affidavit of Ong Chip Wan, there is no evidence of exceptional circumstances... the fact that two Malaysians signed a contract is common nowadays with many commercial activities and diverse interests being generated in the world. From the facts which emerged only at the hearing on 2 December 1992 but which had not been put in at the *ex parte* stage of plaintiffs' summons-in-chambers, it is manifest that after the first shipment of plaintiffs' goods, plaintiffs asked that defendants reduce the freight rates. See paragraph 13 of Hussain Abdul Rahman's affidavit. Also Ong Chip Wan Says: "the parties are free to negotiate two other liftings". But when the defendants asked for the liftings, plaintiffs then decided that the "Agreement be terminated". The Privy Council Report in *Grace Shipping Inc. & Anor. v. C.F. Sharp & Co. (Malaya) Pte. Ltd.* [1987] 1 MLJ 257 is illustrative.

How crucial is non disclosure of material facts? Where a party makes an *ex parte* application for an injunction, that party must make full and frank disclosure of all material facts. [See *Cocoa Processors Sdn. Bhd. v. UMBC Bhd. & Ors.* [1988] 3 MLJ 491]. There was no real attempt to reveal the relevant provisions of the Arbitration Clause. There was a reference to the appointment of the Arbitrator but no full disclosure of the communications between the plaintiffs, the defendants and Arbitrator in relation to that appointment. When one looks at the telexes and the communications, these tell a very different story, a story of default by the plaintiffs is not nominating liftings by the due dates [See HAR 7A to 7H Enc.8]; of attempt to exercise option to cancel the Charterparty because the period of laycans had expired [See HAR 8E Enc.8]; of a request to refrain from arbitration [See HAR 8F and 8I Enc.8]; of an attempt to make the defendants perform the carriage at reduced rates [See HAR 8L Enc.8]; but when this was refused, the allegations of misrepresentation, illegality were then quickly put up. [See Exhibits 7 and 8 of Hussain Abdul Rahman's affidavit of 22 October 1992]. Are these allegations with substance? The allegations of fraud and misrepresentation arose as an afterthought and as a convenient way to deny or terminate the contract. It should be noted that the Contract of Affreightment was signed in September 1990.

That was a time of great uncertainty and yet the defendants took up their position and accepted a business risk. [See paragraph 13 of Hussain Abdul Rahman's affidavit of 22 October 1992]. If shipping rates had gone up, the defendants would still be obliged to perform the contract. The complaint regarding misrepresentation was only raised two years later in May 1992 [See HAR 8M Enc. 8] after defendants refused to lower freight rates and insisted on their rights.

The telexes from defendants to Captain James Anggang of the plaintiffs (at HAR 8) tell a chilly story of how the defendants were trying hard to keep the bargain alive when the plaintiffs did not perform their part. Captain Anggang should be experienced enough to know his responsibilities and to have briefed his superiors. Mr. Seeto Yee, the plaintiffs' Managing Director, then took a surprise stand stating that the plaintiffs would not submit to arbitration under English Law [See HAR 8M dated 22 May 1992] and also wrote a startling letter to the defendants as follows:

> We hereby formally give you notice (on 28 May 1992) that the above named Charterparty is rescinded and deemed null and void *ab initio*".

This was after the plaintiffs had enjoyed the loading of one shipment a year before. Such was the breach of a validly binding contract between two commercial organizations doing business in the world at large. By telex at HAR 8(O) dated 18 June 1992 the plaintiffs stated that they "have rescinded the above contract due to your (defendants') fraudulent misrepresentations and illegal acts... we are seeking legal advice to take actions against you." The telex dated 3 July 1992 from "Sativale & Associates of Subang Jaya" for the first time revealed that they were acting for the plaintiffs. The language used in that telex was "rather emotional".

From the above outline in chronological order, it may appear that the Arbitrator was hurrying to get his award out. If the Court allows itself to become emotional, it can deduce that the Arbitrator was rushing to beat the Court order which was made on 28 July 1992, the same date that Graham Clark set for plaintiffs for submission of points of defence and counterclaim. See the full chronology of events in affidavit of Hussain Abdul Rahman affirmed on 18 September 1992 at paragraphs. 12(i) to 12(xiii). The arbitration resulted in an order dated 6 August 1992 with a finding in favour of the defendants. It seems clear that the plaintiffs have been given every opportunity to submit and to take part in the arbitration proceedings in London. If indeed they wished to challenge the conduct of the arbitrator and/or the validity of the Award made, the proper forum was the High Court in London.

Was the order of the High Court in Borneo at Kota Kinabalu served on the London Arbitrator before he made the Award? His Final Award (see HAR 6) sets out quite extensively the background and the foreplay, as it were, leading to the arbitration. Sadly, the Kota Kinabalu High Court order was only served on the defendants' solicitors on 10 August 1992 by which time the Final Award had been made in London. By the Rules of the High Court 1980 [PU(A) 50/80], O. 45 r. 7(2), an order shall not be enforced under r. 5 unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question. Rule 5 refers to enforcement of judgment to do or abstain from doing an act. So indeed the plaintiffs did not comply with the Rules of the High Court 1980 which is now detrimental to their interests.

Another glaring mishap in plaintiffs' case is that the injunction was directed at Graham Clark but he was nowhere named as a party. See Sweet & Maxwell's **Commercial Litigation, Pre-emptive Remedies**, 2nd Edn., by Goldrein & Wilkinson (1991).

The recent judgment of the Court of Appeal in England *The Channel Tunnel Group Ltd. v. Balfour Beatty Construction Ltd. & Ors.* [1992] 2 Lloyds Rep. 7 and the Times Law Report of 23 January 1992, is against the plaintiffs. This Court agrees with the decision despite Mr. Alex Decena's attempt to distinguish that decision. Lord Goff of Chievely in *Dimskal Shipping Co. S.A. v. International Transport Workers Federation* [1992] 1 Lloyds Rep. 115/[1991] 3 WLR 875 expresses the opinion that "... if a person enters into such a contract (that is, one governed by some other system of law), he has for most purposes to accept the regime of the proper law of the contract ..." **Arbitration Law** by Lloyd's of London Press Ltd. at Chapter 6, p. 6-2 describes several instances of the general rules. Though the Court of Appeal held in *Doleman & Sons v. Ossett Corpn.* [1912] 3 KB 257 that it was not competent for the engineer there to

determine the matters in question, that case is distinguished from the instant case as there the engineer made the award without notice to the parties and without the knowledge or consent of the plaintiffs. And the *"Sungei Bulan"* [1983] 2 MLJ 377 granted a stay of one month "during which time the defendants were to commence arbitration proceedings in London.

The parties' expression of intention is only a *prima facie* evidence as to the proper law applicable. *Helbert Wagg Co. In Re,* [1956] 2 WLR 183, 191/[1956] 1 ALL ER 129, 136. Whether the proper law applicable is the *lex contractus* or *lex solutionis* is a matter of presumption ... and where the parties have expressed themselves (as here) the intention so expressed overrides presumption. Of course as a principle of law and practice a Court will not enforce a contract which is illegal by its own *lex fori* but on the evidence such as I have no illegality has been proved.

I now:

(a) order that the injunction granted by this Court on 28 July 1992 be set aside on the grounds that:

(i) the service of the order was effected after the award had been made;
(ii) the injunction had been obtained by non-disclosure of material facts;
(iii) the arbitration was in accordance with the COA which both plaintiffs and defendants had signed; and
(iv) plaintiffs have failed to establish fraud; and

(b) Secondly, I order that the writ of summons be set aside as:

(i) the plaintiffs and the defendants had signed the COA on 21 September 1990 and are bound by the terms which men of commerce such as the plaintiffs and defendants can understand; and
(ii) the plaintiffs' claim do not merit any adjudication by this Court as the basis of the claim fails due to there being no cause of action or substance proved.

That in short, is my conclusion based on the lengthy evidence and discussion of the legal principles and the applicable laws.

TAN SRI ABDUL AZIZ BIN ZAIN & ANOR.

v.

DEVELOPMENT & COMMERCIAL BANK BHD.

HIGH COURT, KUALA LUMPUR
PUAN RAHMAH BTE HUSSAIN JC
[CIVIL SUIT NO. S7-22-559-90]
16 OCTOBER 1992

CONTRACT: Oral agreement for sale and purchase of land - Whether there was a binding contract - Whether there was a legally enforceable agreement - Whether essential terms of agreement had been agreed upon - Whether termination of agreement by giving twenty four hours untenable and not valid.

AGENCY: Officers of bank negotiating with intended purchasers - Whether officers had actual authority to bind the bank - Whether there was ostensible or apparent authority to bind the bank.

The plaintiffs entered into negotiations with the defendant for the purchase of a piece of land for a purchase consideration of RM35 million. The plaintiffs claimed that the essential terms of the sale were agreed upon and that the manner in which the sale transaction already agreed to, will in fact go through, was to be reduced into writing and the said Purchase Agreement formalised.

The plaintiffs claimed that the defendant's purported termination of the said agreement by giving the plaintiffs 24 hours notice was untenable and not valid and that the said agreement was still binding, there being a concluded agreement.

The defendant contended that although there were negotiations for the sale of the said land by them to the second plaintiff, at no time was an agreement reached between them, their servants or agents on one hand, and the plaintiffs or either of them on the other.

The questions that arose for determination was whether the plaintiffs had adduced evidence to show that the persons allegedly acting on behalf of the defendant namely PW1 and DW1 had the authority, whether actual or ostensible, to bind the defendant and whether or not a legally enforceable agreement was concluded at the meeting between the first plaintiff and DW1 or prior thereto.